



National PROPANE GAS Association

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Dockets Office
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Attention: Docket RSPA-00-7092 - 6

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Dear Sir or Madam:

This letter presents the comments of the National Propane Gas Association (NPGA) on the March 31, 2000 Public Notice and Invitation to Comment related to the application by the American Trucking Associations (ATA) for a preemption determination of certain New Mexico requirements for the transportation of liquified and compressed gases.

NPGA is the national trade association of the LP-gas (principally propane) industry with a membership of about 3,800 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members are retail marketers of propane gas, the membership includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers and appliances. Propane gas is used in over 18 million installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks.

The Hazardous Materials Transportation Uniform Safety Act (HMTUSA) contains preemption provisions that provide that a requirement of a State, political subdivision, or Indian tribe is preempted if: (1) complying with a requirement of the State, political subdivision or tribe and a requirement of HMTUSA or RSPA's regulations implementing same is not possible; or (2) the requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out HMTUSA or RSPA's regulations implementing same. The first preemption prong is commonly called the "dual compliance" prong and the second prong is commonly called the "obstacle" prong.

RSPA's regulations (49 CFR 107.203) enable a party to file an application with the Administration seeking a determination as to whether or not a requirement of a State, political subdivision, or Indian tribe is preempted by HMTUSA. On January 18, 2000, ATA filed for such a determination regarding certain New Mexico statutory and regulatory requirements

relating to the transportation of liquefied petroleum gas (LPG). The provisions at issue fall into three categories:

1. LPG Handling License (NMSA 70-5-7, 19 NMAC 15.4.9.1 - 15.4.9.5);
2. New Mexico Annual Inspections (NMSA 70-5-9, 19 NMAC 15.4.10.1); and
3. New Mexico LPG Annual License Fees (Inspection fees - NMSA 70-5-9; Revenue Suspense Fund - NMSA 70-5-10, 19 NMAC 15.4.14.3(C), 15.4.15.1, 15.4.15.12, 15.4.15.13, 15.4.15.14).

Each of these shall be discussed in turn.

LPG Handling: License

The first category of statutory/regulatory provisions at issue concerns the requirement to obtain a state LPG handling license. The applicable statutory provision, NMSA 70-5-7(A), states: “The bureau may require each person, firm, or corporation that transports or dispenses LP gas or installs, repairs or services appliances, containers, equipment or piping for the use of LP gas to have all persons who perform these activities pass an appropriate examination based on the safety requirements of the commission.” The implementing regulation, 19 NMAC 15.4.9.1, states: “All personnel whose duties require that they transport or dispense LP Gas shall prove by passing an examination, as required by the Bureau, that they are familiar with minimum safety standards and practices with regard to handling of LP Gas. LP Gas may not be dispensed by any person who has not passed the examination by the Bureau.”

The federal training and testing requirements applicable to the transporting, loading, and unloading of LPG are clearly delineated in the Hazardous Materials Regulations (HMRs) at 49 CFR Part 172 Subpart H, 49 CFR 172.702(a) and (d) and 49 CFR 174.704(a) - (c). Under the HMRs, a State may impose a more stringent training requirement for motor vehicle drivers only if the standard does not conflict with Parts 172 and 177 of 49 CFR, and “apply only to drivers domiciled in that State.” See 49 CFR 172.701(b).

New Mexico’s statutory and regulatory provisions cover all LPG handlers, regardless of where they are domiciled. This violates the prohibition in 49 CFR 172.701(b) that requires such state programs to be limited only to drivers domiciled in that State. Furthermore, New Mexico’s imposition of a license fee on all LPG haulers in the State, regardless of where they are domiciled, creates an obstacle to achieving the HMRs goal of uniformity as it relates to the movement of hazardous materials in commerce. Thus, under the “obstacle” prong of HMTUSA’s preemption provision, 49 USC 5125(a)(2), RSPA should issue a determination preempting NMSA 70-5-7 and 19 NMAC 15.4.9.1-.5.

Annual Inspections

The second category of statutory/regulatory provisions at issue concerns the requirement to have an inspection of all LPG vehicles operated in the State. The applicable statutory provision, NMSA 70-5-9(C), states: “In addition, there shall be paid a reasonable fee for the safety inspection, made by a representative of the bureau, of each LP gas bulk storage plant, LP

gas liquid transfer facility and of the LP gas equipment on each vehicular unit used for transportation of LP gas in bulk quantities.” The implementing regulation, 19 NMAC 15.4.10.1, states: “There shall be an annual safety inspection, made by an inspector of the Bureau, of each bulk storage plant facility, dispensing station, vehicle fuel dispenser, and cargo container and safety equipment on each vehicular unit used for transportation of LP gas in bulk quantities. Each bulk plant, dispense, and vehicular unit shall display a current decal showing it has passed the required inspection.”

HMTUSA's “obstacle” preemption provision provides that state requirements are preempted if “the requirement of the State...as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under the chapter.” 49 U.S.C. 5125(a)(2). The New Mexico provisions cited above should be preempted because such non-federal periodic inspections cannot be accomplished without “unnecessary delay,” as prescribed in 49 CFR 177.800(d), which states that “All shipments of hazardous materials must be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.”

There are tens of thousands of state, county and local jurisdictions nationwide. If all these separate governmental entities required inspections in addition to those already required under the HMRS, the delay of hazardous materials transportation would be indisputable. Indeed, RSPA has already struck down such non-federal periodic inspections. See 58 Fed. Reg. 48,933 (Sept. 20, 1993) (PD-8(R), PD-9(R), PD-10(R), PD-11(R)), *aff'd* on reconsideration, 60 Fed. Reg. 8,800 (Feb. 15, 1995).

Motor carriers are already subject to Federal annual and roadside inspections in accordance with 49 CFR Part 396, and to inspection, repair, and maintenance inspections for cargo tanks in accordance with 49 CFR 180.401 - 180.417. Therefore, the New Mexico inspection requirements are duplicative and cause unnecessary delay in the transport of hazardous materials. Accordingly, the New Mexico provisions on inspections of transporters of LPG should be preempted by RSPA under HMTUSA as an obstacle to the transport of hazardous materials.

Annual License Fees

The third category of statutory/regulatory provisions at issue concerns the requirement to pay an annual license fee for LPG vehicles operated in the State. The applicable statutory provision, NMSA 70-5-9(A), states: “For the purpose of defraying the expenses of administering the laws relating to the use of CNG in motor vehicles or the LP gas industry, each person, firm, or corporation, at the time of application for a license and annually thereafter on or before December 31 of each calendar year, shall pay to the bureau reasonable license fees as set, classified and defined by the bureau for each operating location. Provided, the total annual fees charged any one licensee for a combination of LP gas activities at one location and subject to licensure under this section shall not exceed three hundred fifty dollars (\$350), and the fee charged for any single activity operation as set, classified and defined by the bureau shall not exceed one hundred fifty (\$150) dollars.” In addition, NMSA 70-5-10, states: “All fees and

money collected under the provisions of the LPG and CNG Act shall be remitted by the bureau to the director of the division to be deposited in the general fund of the state. . . ."

The following fee structure is provided by regulation:

1. 19 NMAC 15.4.14.3(C) - LP Gas Visual Cargo Tank and Equipment Inspection Form - \$37.50;
2. 19 NMAC 15.4.15.1 - Wholesale sale or delivery of LP Gas - \$125.00;
3. 19 NMAC 15.4.15.12 - Annual renewal fee per qualifying party identification card - \$10.00;
4. 19 NMAC 15.4.15.13 - Licensing examination fee - \$25.00; and
5. 19 NMAC 15.4.15.14 - Licensing re-examination fee - \$25.00.

The New Mexico fees are annual, flat fees unapportioned to the motor carrier's presence or level of activity in the state. The U.S. Supreme Court has struck down such fees as an impermissible burden on interstate commerce. *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *Scheiner*, the Court struck down two Pennsylvania lump-sum annual "taxes" on each truck traveling on the state's highways, whether registered there or not. The Court used an "internal consistency" test. To pass that test, "a state tax must be of a kind that, if applied by every jurisdiction, there would be no impermissible interference with free trade. If each state imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the states would be deterred." *Id.* at 284.

Flat, annual fees like New Mexico's discriminate against and impose an undue burden on interstate commerce. Other courts, following *Scheiner*, have routinely struck down such fees. See *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) (\$25 per truck hazardous material transporter annual charge struck down); *American Trucking Associations, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993) (\$200 per truck annual hazardous waste transporter fee held unconstitutional); *American Trucking Association, Inc. v. State of New Jersey*, 324 N.J. Super. 1 (App. Div. 1999) (\$21 per truck hazardous material transporter fee remanded to Tax Court, with fees subject to refund pending final decision); *American Trucking Associations, Inc. v. State*, 556 N.W.2d 761 (Wis. App. Ct 1996) (\$400 per company, per activity hazardous material transporter annual fee struck down as violating the Commerce Clause).

In addition to the courts, RSPA has also invalidated flat, annual fees such as New Mexico's fees based on 49 USC 5125(g)(1). Congress, in enacting HMTUSA, incorporated a test that a State must satisfy in order to impose a fee relating to the transportation of a hazardous material. Under 49 USC 5125(g)(1), a "State...may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous

material, including enforcement and planning, developing and maintaining a capability for emergency purposes.” (emphasis added).

The New Mexico provisions fail the “fairness” prong of 49 USC 5125(g)(1) in light of other RSPA preemption determinations. See, e.g., 64 Fed. Reg. 54,474 (Oct. 6, 1999) (PD-21 (R)) (“Because Tennessee’s remedial action fee imposed on hazardous waste transporters is not based on some fair approximation of the use of the facilities and discriminates against interstate commerce, it is not fair and violates 49 USC 5125(g)(1) and is preempted...”).

New Mexico’s requirements also fail the second prong of 49 USC 5125(g)(1), the “use” prong. The revenues collected under New Mexico law go directly into the general fund of the state. See NMSA 70-5-10. No indication is given in the New Mexico law that the monies collected will be used, as HMTUSA requires, for purposes relating to hazardous materials transportation, including enforcement and planning, development and maintenance of emergency response capability.

Because the fees structure contemplated by the above-described New Mexico statutory provisions and regulatory provisions are violative of 49 USC 5125(g)(1), RSPA must determine that these provisions are preempted by HMTUSA.

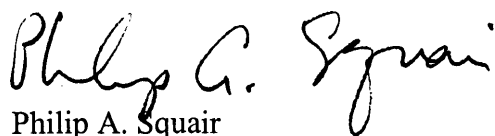
Conclusion

For the foregoing reasons, NPGA urges RSPA, consistent with HMTUSA and the HMRs, to preempt the New Mexico statutory provisions (NMSA 70-5-7, 70-5-9, 70-5-10) and New Mexico regulatory provisions (19 NMAC 15.4.9.1, 15.4.9.2, 15.9.4.3, 15.9.4.4, 15.9.4.5, 15.4.10.1, 15.4.14.3(C), 15.4.15.1, 15.4.15.12, 15.4.15.13, 15.4.15.14) at issue.

I certify that copies of this comment have been sent to Mr. Borngardner and Mr. Chapman at the addresses specified in the **Federal Register**.

Thank you for this opportunity to provide comments. Should you have questions or require further information, please contact me anytime.

Sincerely,



Philip A. Squair
Director of Regulatory Affairs

Cc: B. Glassgow
C. Leason
D. Myers
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